No. 14,995

IN THE

United States Court of Appeals

For the Ninth Circuit

MASAO HIRASUNA, doing business as Mike's Auto Top Shop & Upholstery Shop,

Appellant,

vs.

S. V. McKENNEY, District Director of Internal Revenue,

Appellee.

Upon Appeal from the United States District Court for the District of Hawaii.

CLOSING BRIEF FOR MASAO HIRASUNA, APPELLANT.

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SUMMARY OF ARGUMENT.

(1) The appellee has overlooked a very important late decision of the Supreme Court of the United States, affirming a decision of this Court of Appeals, decided only on March 5, 1956, unknown and unavailable to the writer of the opening brief when he sent it in to the printers, on the question of inconsistent rulings by the Treasury Department. Said case clearly contradicts appellee's position.

(2) Appellee fails to grasp fundamental concept of "contract for labor and materials". The Hawaii

Uniform Sales Act specifically recognizes contracts for labor and materials. The performance of a contract for labor and the supplying of materials is not a "sale" of an "auto part".

ARGUMENT.

I.

MOST RECENT DECISION OF SUPREME COURT OF UNITED STATES REFUTES APPELLEE'S ARGUMENT REGARDING RULINGS.

Appellee's argument that the "Commissioner is not bound by his own or his predecessor's prior mistakes of law" (ans. br. 26-29) is an admission that there was a substantial change of position with relation to seat covers made to the order of the customer.

Appellee's answering brief, attempting to uphold its *ad hoc* change of interpretation of August 18, 1952, reversing its long continued practice of excluding custom installed seat covers as "parts or accessories", may be directly answered by citing and quoting from the most recent case of *United States v. Leslie Salt Co.*, ... U.S. ....., 76 S.Ct. 416, decided only on March 5, 1956, which affirms the decision by Judge Healy of this Circuit Court of Appeals reported in 218 F.2d 91 and that of District Judge Goodman reported in 110 F.Supp. 680.

The Supreme Court, in said decision, held that where Treasury Department *had long interpreted* terms "debenture" and "certificate of indebtedness" to exclude certain long term corporate promissory

notes, and such interpretation had express and implied congressional acquiescence for many years, and was in accord with generally understood meanings of respective terms, though treasury had recently *ad hoc* changed interpretation to include such instruments, court would consider prior interpretation persuasive in determining whether to construe statute to exclude such promissory notes. In so holding, the Supreme Court stated at pages 423-425 (S.Ct. Rep.) as follows:

> "There are persuasive reasons for construing 'debentures' and 'certificates of indebtedness' in accordance with the Treasury's original interpretation of those terms in this statute's altogether comparable predecessors. In Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315, 53 S.Ct. 350, 358, 77 L.Ed. 796, Mr. Justice Cardozo said:
>
> > *'administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful.* United States v. Moore, 95 U.S. 760, 763, 24 L.Ed. 588; Logan v. Davis, 233 U.S. 613, 627, 34 S.Ct. 685, 58 L.Ed. 1121; Brewster v. Gage, 280 U.S. 327, 336, 50 S.Ct. 115, 74 L.Ed. 457; Fawcus Machine Co. v. United States, 282 U.S. 375, 51 S.Ct. 144, 75 L.Ed. 397; Interstate Commerce Comm. v. New York, N.H. & H.R. Co., 287 U.S. 178, 53 S.Ct. 106, 77 L.Ed. 248 * * *. *The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of*

> *making the parts work efficiently and smoothly while they are yet untried and new.'*
>
> *Against the Treasury's prior longstanding and consistent administrative interpretation its more recent ad hoc contention as to how the statute should be construed cannot stand. Moreover, that original interpretation has had both express and implied congressional acquiescence, through the 1918 amendment to the statute* (76 S. Ct. 420), *which has ever since continued in effect, and through Congress having let the administrative interpretation remain undisturbed for so many years.* See Corn Products Refining Co. v. Commissioner, 350 U.S. 46, 53, 76 S.Ct. 20, 24; Norwegian Nitrogen Products Co. v. United States, supra, 288 U.S. at page 313, 53 S.Ct. at page 357. Still further, it is an interpretation which is in accord with the generally understood meaning of the term 'debentures'. Cf. First Nat. Bank of Cincinnati v. Flershem, 290 U.S. 504, 508, 54 S.Ct. 298, 78 L.Ed. 465. 'The words of the statute (a stamp tax statute) are to be taken in the sense in which they will be understood by that public in which they are to take effect.' United States v. Isham, supra, 17 Wall. at page 504, 21 L.Ed. 628." (Emphasis ours.)

The foregoing decision of the Supreme Court is very pertinent herein in that the Treasury Department in the present case, by its *ad hoc* ruling of August 18, 1952, made a complete turnabout with relation to the taxability of custom installed seat covers, contrary to a "contemporaneous construction of a statute by men charged with the responsibility of setting its

machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." While the case before the Supreme Court involved a stamp tax and this present case involves a sales tax; the analogy, in both cases, by way of parallel *ad hoc* subsequent contradictory rulings, makes the aforementioned recent Supreme Court ruling most pertinent, if not controlling.

II.

APPELLANT'S ARGUMENT REGARDING CONTRACT FOR WORK, LABOR AND MATERIAL, REMAINS UNANSWERED.

Appellee's answering brief attempts to answer appellant's argument that the contract was for labor and materials (ans. br. 22-26), but the answer is inadequate and completely fails to grasp the elementary concept of a contract for labor and materials.

The concept is not one unknown in Hawaii in that Section 9204 of the Revised Laws of Hawaii 1945, a portion of our uniform sales act, provides:

> "but if goods are to be manufactured by the seller especially for the buyer and not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply."

The customer in the present case agrees to have the appellant using his specialized labor put in the customer's automobile certain materials which has no semblance of an auto part. Appellant performs the work, charges for what he has contracted to do, sup-

ply labor and materials. There is no tax on the performance of labor, nor is there a tax on the supplying of bare cloth material. The transaction is one definitely recognized in law as not being a sale. The revenue act taxes the "sale" of "auto parts" and no other.

Dated, Honolulu, T. H.,
May 11, 1956.

Respectfully submitted,
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Attorney for Appellant
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